

No. 13,969

IN THE
United States Court of Appeals
For the Ninth Circuit

LEO WING ON and LEO WING WAH,
Appellants,

vs.

J. HOWARD McGRATH, Attorney Gen-
eral of the United States,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

SALVATORE C. J. FUSCO,
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The appellee in his brief has raised the question of jurisdiction (p. 2), by his contention that the federal Courts do not have jurisdiction of this case. The question of jurisdiction is now raised for the first time and was not raised in any of the District Court proceedings.

The matters of jurisdiction and abatement were brought before this Honorable Court, sitting en banc, on the 5th day of February, 1954, when the consolidated cases of *Acheson v. Furusho*, No. 13093; *Gee v.*

Acheson, No. 13712; *Ging v. McGranery*, No. 13774, and *Acheson v. Bew*, No. 14051, were argued and heard. The decision of the Court was rendered on 1 April 1954, and the Court found that the federal Courts did have jurisdiction of this action, wherein the Court held:

“It is too plain for argument that the subject matter is within the jurisdiction of the district court and our jurisdiction is clear.”

The issue in this case was the matter of abatement of causes of action, and after hearing argument, the Court concluded that substitution of parties should be granted upon motion of parties, as provided by the text of the opinion of the Court, wherein said opinion sets forth:

“In summation, also, we repeat that since a judgment rendered in a Section 903 action cannot be a command to any head of any governmental department to do anything or to refrain from doing anything, but fixes a status for the plaintiff which all persons inclusive of governmental authorities must respect, the action does not relate to the ‘discharge’, i.e., the carrying out, of any official duty.

Since the judgments obtained or which may be obtained in the instant cases would not be ineffectual, but would establish to the world whether or not the plaintiffs are United States nationals, no reason or law exists requiring their abatement simply because there has been a period when the ex-officio defendant has not been formally made a party to the action.

Undoubtedly, the federal courts have the inherent power and duty to require that cases be kept in the course of accepted and regular procedure. And, in the circumstances of the instant cases and not by reason of statute or court rule, action should be taken upon the fact that the cases themselves have not abated but, by reason of the nominal defendants' separation from office, their successors in office should be substituted and the cases, with the ex-officio defendants substituted as defendants, should proceed in the regular course of appeal in this court."

The instant case on appeal is identical in factual and in legal principle with the above cited actions.

Wherefore, appellants respectfully pray that the judgment of the District Court, dismissing the complaints on the ground that the actions have abated, be set aside and appellants be given their day in Court.

Dated, San Francisco, California,

April 19, 1954.

SALVATORE C. J. FUSCO,

Attorney for Appellants.

